Supreme Court, U.S.
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No. 06-767

IN THE

# Supreme Court of the United States

OBERWEIS DAIRY,

*Petitioner,*

*v.*

JANE DOE,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

## REPLY BRIEF

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## RULE 29.6 STATEMENT

Petitioner Oberweis Dairy, Inc. is a non-governmental corporation. Petitioner is a wholly owned subsidiary of The Oberweis Group, Inc. No publicly held company has any ownership interest in Petitioner or its parent corporation.

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## REPLY BRIEF

### I. Doe's Brief In Opposition Does Not Provide Any Reason To Deny Review On The Question Of Whether A Plaintiff Must Cooperate With The EEOC As A Prerequisite To Suit Under Title VII.

In its Petition, Oberweis demonstrates a clear split of authority between the Seventh Circuit on the one hand, and the Tenth Circuit (as well as district courts in five other circuits) on the other, as to whether a plaintiff must cooperate with the EEOC as a prerequisite to suit under Title VII. Doe effectively concedes that the decision below creates such a split.[1] Moreover, she does not dispute the key premises supporting Oberweis's contention that the Seventh Circuit erred in ruling as it did:

- Congress intended cooperation and conciliation, rather than litigation, to be the cornerstone of Title VII's enforcement procedures.
- Title VII accordingly mandates, without qualification, that the EEOC shall investigate each charge filed, determine whether there is "reasonable cause" to believe the allegations are true, and, if so, to attempt to resolve the charge through conciliation and persuasion.

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1. While Doe notes that *Shikles v. Sprint/United Management Co.*, 426 F.3d 1304 (10th Cir. 2005) addressed the Age Discrimination in Employment Act rather than Title VII, and asserts that "there may be differences between the statutes that would affect the outcome of the question presented," she does not identify any such differences. Moreover, Doe ignores the fact that *Shikles* followed an earlier Tenth Circuit case, *McBride v. Citgo Petroleum*, 281 F.3d 1099 (10th Cir. 2002), in which the court held that the same duty of cooperation exists under Title VII and the ADA.

- The EEOC cannot perform its statutory duty unless the charging party cooperates in its investigation.

Instead, Doe argues that this case is not an appropriate vehicle for resolving the split between the circuits, because she "acted in good faith." Specifically, Doe contends that her refusal to be interviewed did not prevent the EEOC from investigating her charge, because it was able to interview other witnesses, and her attorney offered to answer the EEOC's questions in her stead. Further, she contends that her refusal was justified, because the EEOC embarrassed her by disclosing personal information to interviewees, and because her therapist advised against an interview. Neither argument provides a reason to deny the petition.

**A. The courts should generally defer to the EEOC with respect to its determination that a charging party's refusal to cooperate has rendered it unable to resolve a charge.**

Doe's claim that she adequately cooperated notwithstanding her refusal to be interviewed begs the question of whether the courts should determine *de novo* if cooperation requested by the EEOC was necessary for the agency to conduct a meaningful investigation. Oberweis submits that such an inquiry is unnecessary, because the EEOC has already made that determination when it exercises its authority to dismiss a charge under 29 C.F.R. 1601.18(b) due to a charging party's failure to cooperate. Thus, when a plaintiff files a Title VII suit after such a dismissal, it is typically not necessary for the court to second-guess the EEOC by deciding whether it "really" needed the cooperation it sought. Instead, the proper question is whether the plaintiff had a reason for noncompliance that, in equity, justifies an exception to the general requirement of cooperation.

Accordingly, Doe's contention that the EEOC might have obtained enough information for a meaningful investigation without her interview misses the point: the EEOC decided otherwise, and was in the best position to know what it needs to perform its statutory duties. In any event, Doe's suggestion that an interview was superfluous in light of her "extensive" cooperation is unsupported. Doe does not state what information she (or, rather, her attorneys) supposedly provided beyond the allegations of her charge and the names of individuals to be interviewed, nor did she do so before the district court. While the EEOC interviewed several witnesses, the investigator's notes suggest that none of those witnesses were aware of harassment directed toward Doe, let alone witnessed the principal incident upon which Doe's claim is based – i.e., the sexual encounter between Nayman and Doe at Nayman's apartment.[2]

The EEOC was also justified in finding that the offer of Doe's attorney to answer questions in Doe's stead was not an adequate substitute for an interview with Doe. That determination was fully consistent with the EEOC's regulations, which expressly identify refusal "to appear or to be available for interviews or conferences as necessary" as a form of non-cooperation that may render the agency "unable to resolve the charge." 29 C.F.R. 1601.18(b). The policy reasons underlying this rule are obvious. Among other things, unlike an interview, an attorney's statement does not facilitate an assessment of credibility, nor does it provide a ready opportunity for follow-up questions or clarification. Further, the risk of misunderstanding, incompleteness, or

2. Doe's characterization of the EEOC investigator's interview notes with respect to conduct directed toward other employees is also less than complete and accurate. For example, according to the investigator's notes, the one witness who said that Nayman "kissed her on the forehead" and "grabbed [her] butt" on three or four occasions also stated that she regarded Nayman as a friend, was not bothered by his conduct, and never complained about it.

obfuscation increases whenever information is passed through an agent, particularly where the job of that agent is to advocate for a client.

### B. Whether Doe had a duty to cooperate with the EEOC is squarely before this Court, because Doe failed to present evidence establishing an equitable reason to excuse her refusal to cooperate.

There is no question that Doe refused to cooperate with the EEOC's request for an interview, or that an interview with the charging party is ordinarily a necessary and appropriate part of the EEOC's investigation. Accordingly, Doe's primary argument against review of the question presented by the petition depends upon her claim that she had a good reason for refusing to cooperate. In the district court, Doe presented only one excuse: she claimed that the EEOC failed to keep her identity confidential and disclosed personal information about her to other witnesses, causing her embarrassment. In essence, Doe argued that the EEOC should have investigated her charge without interviewing her or asking witnesses whether they saw Nayman direct any inappropriate conduct toward her. The district court properly rejected that argument. Appendix to Oberweis's Petition for Writ of Certiorari, ("Pet. App.") 33a.

Moreover, the record contains no evidence that the EEOC investigator disclosed sensitive personal information about Doe to any witnesses. To the contrary, the investigator's notes suggest that interviewees were merely asked whether they "had occasion to witness any inappropriate interaction between Matt and [Doe]." Thus, as the district court held, "while the questions may have elicited answers containing intimate information, those questions by the EEOC do not disclose intimate information." Pet. App. 33a.

On appeal to the Seventh Circuit and in her opposition brief, Doe offers a second excuse for her refusal to be interviewed: she contends that she declined an interview on the advice of her therapist. As Oberweis noted in its brief to the Seventh Circuit (Appellee Br. at 20, 23), Doe waived this argument because she did not raise it before the district court. *See, e.g.*, Pet. App. 32a-33a (listing the arguments raised before the district court on the issue of Doe's failure to cooperate); *Williams v. REP Corp.*, 302 F.3d 660, 666 (7th Cir. 2002) ("a party waives any argument that it does not raise before the district court").

Further, the record contains no evidence for Doe's claim that her therapist advised against an interview. The sole reference to such advice is a letter from Doe's attorney to the EEOC investigator, asserting that Doe refused to be interviewed "on the advise [sic] of both her counselor and her mother," and that "it is not in her best interest to come in and be interrogated by you and as a minor she is not required to do so." That letter, dated April 7, 2003, was sent three months after the investigator first began attempting to schedule an interview, and only after the EEOC warned that it would dismiss Doe's charge unless she cooperated. Doe did not present any testimony – hers, her mother's, or her counselor's – to corroborate her attorney's assertion to the EEOC that she declined to be interviewed on the advice of her counselor. Thus, even if Doe had raised this argument before her appeal, the district court would have been correct to hold that Doe failed to show a valid reason for her failure to cooperate with the EEOC.

Although Doe suggests otherwise (Opp. Br. 5), the Seventh Circuit did not "hold" that the district court erred in finding that Doe failed to present a valid excuse for her noncompliance. Rather, after holding that Doe had no duty to cooperate with the EEOC as a prerequisite to maintaining her Title VII claim, the court speculated that Doe might be

able to establish an equitable exception to such a requirement, if it existed:

> Was this a failure by the plaintiff to "cooperate"? In a literal sense, yes, as the Commission ruled in dismissing the administrative complaint on that basis. Evidently the Commission didn't think that without interviewing the plaintiff it could determine whether to bring suit against the employer on her behalf. . . . But was she acting in bad faith for failing to cooperate to the extent sought by the Commission? For all we know, even the Tenth Circuit would say no; for she had a reason not to cooperate.

Pet. App. at 10a. This statement is *dicta*, not a finding of fact or a conclusion of law. Having found that Doe had no duty to cooperate, there was no need for the Seventh Circuit to scrutinize Doe's stated reasons for her failure to cooperate. As discussed above, the record shows that the stated reasons do not justify Doe's refusal to cooperate. Should this Court grant certiorari on the initial question of whether cooperation is necessary, Oberweis respectfully suggests that the Court should affirm the judgment of the district court that Doe failed to establish equitable reasons for her noncompliance.

### C. *Woodford v. Ngo* is inapposite.

Doe next incorrectly asserts that Court's opinion in *Woodford v. Ngo*, 238 S. Ct. 2378 (2006) "provides a compelling reason" not to grant Oberweis's petition. *Woodford* addressed whether a prisoner can satisfy the exhaustion requirements of the Prison Litigation Reform Act of 1995 ("PLRA"), 42 U.S.C. § 1997e *et seq.*, by filing an untimely or otherwise procedurally defective grievance or appeal at the state level. *Woodford* did not involve a claim under Title VII, the ADEA, or the ADA. Moreover, the Title VII and ADEA provisions discussed in *Woodford* were not those at issue in this case.

The prisoner in *Woodford* argued that PLRA's requirement that prisoners exhaust state remedies before filing suit in federal court were modeled upon § 14(b) of the ADEA, 29 U.S.C. § 633(b), and §706(e) of Title VII, 42 U.S.C. § 2000e-5(e). The specific ADEA and Title VII provisions upon which the prisoner relied were those requiring a party to initiate proceedings with the applicable state enforcement agency, if any, before filing suit. That requirement is not at issue in this case: Doe filed her charge with the EEOC, and it is her failure to cooperate with the EEOC, not the Illinois Department of Human Rights, that bars her from pursuing her Title VII claim.

The distinction between cooperation with the EEOC, and concept of exhaustion of remedies before a state enforcement agency is crucial. Title VII requires the EEOC to investigate each charge filed, determine whether there is reasonable cause to believe the allegations are true, and if so, to attempt informal resolution of the charge through conciliation and persuasion. No such mandate exists with respect to state agencies. Thus, placed in proper context, the Court's statement that "neither of these provisions makes reference to the concept of exhaustion, and neither is in any sense an exhaustion provision" bears only upon the exhaustion of *state* remedies, not a charging party's duty to cooperate with the EEOC's statutorily-mandated investigation.

### D. The Court should not deny the petition in deference to the EEOC's litigation position in the Seventh Circuit.

In an effort to minimize the significance of the EEOC's dismissal of her charge, Doe seems to argue that the agency's *amicus* brief to the Seventh Circuit repudiates its earlier finding that Doe's refusal to be interviewed rendered the EEOC "unable to resolve her charge," as required for a dismissal under 29 C.F.R. 1601.18(b). Opp. Br. at 6-7. Contrary to Doe's suggestion, the EEOC's appellate brief did not contradict its earlier finding. Instead, the agency simply took the position that Title VII does

not require cooperation, and that Doe should be allowed to proceed with her suit notwithstanding her refusal to cooperate.

It is well established that an agency's litigation position on a matter of statutory interpretation is entitled to little, if any deference. *See, e.g., Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212-213 (1990). Accordingly, the fact that the EEOC advocated for the rule adopted by the Seventh Circuit below does not counsel against granting Oberweis's petition. As Oberweis argues at length in its petition, the duty of cooperation is inherent in Title VII. Accordingly, the petition should be granted notwithstanding the position advanced by the EEOC in the court of appeals.

## II. Doe's Brief In Opposition Also Does Not Set Forth Any Reason To Deny Review On The Second and Third Questions Presented By The Petition.

### A. The Court should grant review because the Seventh Circuit's ruling is a clear departure from established law.

Doe observes in her opposition brief that "there exists no split among the circuits on the second and third issues presented." While accurate in a narrow sense, Doe's assertion disregards the fact that the decision below discards the well-developed analytic framework arising from this Court's decisions in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986), and *Harris v. Forklift Systems*, 510 U.S. 17 (1993). As argued in Oberweis's petition, review is warranted both because this departure from established law is neither legally justified nor necessitated by policy considerations, and because the decision below is likely to have serious negative consequences for employers of teenagers.

Indeed, Doe herself relies upon this Court's determination in *Meritor* that, in deciding whether sexual advances are actionable, "the correct inquiry is whether [Doe] by her conduct indicated that the alleged sexual advances were unwelcome,

not whether her actual participation in sexual intercourse was voluntary." 477 U.S. at 68. Yet this is precisely the inquiry precluded by the decision below, which holds that Doe's legal inability to consent to sex under Illinois law is dispositive, regardless of whether or not she in fact welcomed Nayman's conduct.

Although Doe asserts that the Seventh Circuit's determination was correct, she cites no authority supporting the view that a single factor, such as age, should be regarded as dispositive in determining whether a plaintiff "welcomed" alleged sexual harassment. To the contrary, she cites a series of cases for the proposition that "federal courts of appeals have often cited to an employee's minority status as a material fact in Title VII harassment cases." Opp. Br. 10, n.3. Far from justifying the Seventh Circuit's "bright line" rule, these cases demonstrate that existing Title VII law adequately accounts for a plaintiff's age, and that courts and juries are capable of making the kinds of judgments about maturity that the Seventh Circuit deems too difficult.

**B. Doe's assertions regarding the factual record and findings below are inaccurate, and do not warrant denial of the petition.**

Doe asserts that the Court should deny review because she "adequately demonstrated that Nayman's conduct was not welcome," notwithstanding the Seventh Circuit's determination that she could not have "welcomed" Nayman's conduct as a matter of law. As an initial matter, Doe's argument ignores the procedural status of the ruling below. The Seventh Circuit reversed the district court's entry of summary judgment and remanded this case for trial. However, it ruled that Nayman's conduct toward Doe must be deemed unwelcome as a matter of law, thus preventing Oberweis from raising that issue at trial. Review of the Seventh Circuit's judgment would thus be warranted even if Doe had raised a genuine issue of material fact as to whether she found Nayman's conduct "unwelcome" or subjectively regarded her workplace as "hostile or abusive."

However, Oberweis respectfully submits that Doe failed to present sufficient evidence on these issues, and that the district court's judgment should therefore be affirmed. In an effort to cast doubt on those findings, Doe quotes from a portion of the Seventh Circuit's decision, in which the court held that the district judge "stepped outside the proper role of a judge asked to decide a motion for summary judgment," in finding that "once, Nayman gave Plaintiff a hug and kiss in an effort to make Plaintiff happy," and "Nayman also 'playfully' hit Plaintiff on the behind with a rag on one occasion." With due respect to the Seventh Circuit, these and the other facts regarding Nayman's conduct toward Doe recited by the district court (Pet. App. 28a-29a) are taken directly from Doe's own deposition testimony. Accordingly, it is difficult to see how they "constitute findings on contested issues."

Doe also quotes from a section of the decision below in which the Seventh Circuit describes Nayman's purported workplace conduct toward Doe and other employees. Opp. Br. at 12, *quoting* Pet. App. at 12a. Again, Oberweis respectfully suggests that the court's description of the factual record is somewhat misleading – Doe did not testify, for example, that Nayman ever "groped" her, "grabbed" her "butt," or gave her a "tittie twister." That aside, Doe's suggestion that the facts described by the court of appeals somehow establish that Nayman's conduct was "unwelcome" is simply baseless.

## CONCLUSION

For the foregoing reasons, and those stated in its Petition for a Writ of Certiorari, petitioner Oberweis Dairy, Inc. respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

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